DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0341
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DANIEL EDWARD FORCE, SR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-153286-001 DT

The Honorable Pamela Hearn Svoboda, Judge *Pro Tem*

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

Daniel Edward Force, Sr., — Phoenix
Appellant *In Propria Persona*

D O W N I E, Judge

¶1 Daniel Edward Force, Sr. ("defendant") timely appeals his convictions for aggravated driving or actual physical control while under the influence ("DUI") pursuant to Arizona Revised Statutes ("A.R.S.") sections 28-1381 (Supp. 2009) and -1383 (2009).[1] Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record and found no arguable question of law. Counsel requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona*, and he has done so. On appeal, we view the evidence in the light most favorable to sustaining the convictions. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied,* 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 About 4:00 p.m. on August 25, 2008, Officer P.M. was off-duty, shopping with his wife. He saw an individual, later identified as defendant, "having a hard time standing and walking." Defendant stumbled and used P.M.'s vehicle to regain his balance; he then "continued on walking again though stumbling." Defendant's eyes were "red, blood shot and watery."

[1] We cite the current version of relevant statutes because no revisions material to this decision have occurred.

P.M.'s wife called 9-1-1. P.M. watched as defendant got into a truck and backed out of a parking space. Defendant had trouble navigating out of the parking space, but then drove past P.M., looked directly at him, waved, and drove off. P.M. watched defendant's vehicle until police officers arrived; he saw no one exit the vehicle, and defendant was the only person P.M. saw get into the vehicle.

¶3 Officer J.W. responded to the 9-1-1 call. He found defendant seated in the passenger seat. When Officer J.W. drove his marked police vehicle past the truck, defendant "slouched down" in the passenger seat so "it would be hard to see him." Officer J.W. observed defendant until back-up arrived; the truck was stationary the entire time. Officer J.W. smelled an "intoxicating or an alcohol-type beverage . . . emanating off [defendant's] breath." Defendant "stumbled out" of the truck and "put his arms over the bed of the truck and laid there for a couple of minutes," requiring Officer J.W. to tap him on the shoulder to get answers to his questions. Defendant "couldn't stand straight, he was swaying back and forth." Defendant admitted drinking "about eight beers," but denied driving the truck, explaining "his wife moved the vehicle to where it was now . . . took the keys and hid them . . . and then got in her vehicle and drove off." Officer J.W. found the truck keys on the floorboard of the back seat.

¶4 After being arrested and receiving *Miranda* warnings, defendant admitted consuming alcohol at a nearby bar. When asked to rate his ability to drive on a scale of one to ten, defendant answered "7," indicating "moderately impaired ability to drive." Defendant said he would be unable to go to work in his present condition and answered "hell no" when asked whether he would drive his children or allow someone else to drive them in his condition. Breath tests revealed defendant's blood alcohol level to be .307 at 5:09 p.m. and .313 at 5:16 p.m. Defendant was charged with four counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs.

¶5 At trial, a Department of Public Safety criminalist testified that the machine used for the breath testing was functioning properly, and the tests were "valid." The custodian of records for the Motor Vehicle Division ("MVD") testified defendant's "driver's license privileges were under revocation" on August 25, 2008, and that defendant was notified of this status by letter mailed to his address of record.

¶6 Defendant's wife testified that she drove him to the parking lot during the noon hour. She drove because both she and defendant knew "he didn't have a license." The wife and defendant argued. She got out of the truck and threw the keys "toward the back seat" before walking home and returning to

work. Defendant did not testify. The jury was excused, and the State orally moved to amend counts 1 and 2 to correct a "technical defect" in the charging document. The motion was granted without objection.

¶7 The jury found defendant guilty of all counts. For sentencing purposes, defendant stipulated to a prior aggravated DUI conviction in 1998. After engaging in a colloquy with defendant, the court accepted his waiver of a jury trial and admission of the prior offense. Defendant was sentenced to the presumptive term of 4.5 years and ordered to pay fines and assessments; he was given thirty days' pre-sentence incarceration credit.

DISCUSSION

¶8 We have read and considered the briefs submitted by defendant and his counsel and have reviewed the entire record. *State v. Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

¶9 In the opening and supplemental briefs, defendant and his counsel identified several issues. We address each separately.[2]

1. Juror Question

¶10 Defendant questions whether he should have been present when the court considered a juror question. The record demonstrates that defense counsel was present and waived defendant's presence.[3] When a defendant's position is represented and protected by counsel, his presence is not required when the court considers a jury question. *See State v. Lawrence*, 123 Ariz. 301, 305-07, 599 P.2d 754, 758-60 (1979); *State v. Swoopes*, 216 Ariz. 390, 401-02, ¶¶ 33-39, 166 P.3d 945, 956-57 (App. 2007).

2. Weighing Evidence

¶11 Defendant asserts three issues relating to the jury's weighing of evidence. First, he states he did not drive the

[2] In addition to the topics discussed, defendant raised several issues we do not address because they have no basis in the record. For example, he asserts the jury was "denied by the Court to see the original police report." The record does not support this contention. Defendant also claims that the 9-1-1 caller was "used as the evidence against me in the secondary person and yet there's no evidance [sic] to the accusations against me from her." No statements from the 9-1-1 caller were admitted into evidence.

[3] The jury question asked "where is [Officer J.W.'s] . . . report." The trial court's proposed answer was that jurors "have all the evidence that has been introduced at trial." Counsel did not object to this answer.

truck and was thus innocent. Second, he says reasonable doubt existed because a "witness testified the truck was parked in the same location." Lastly, he contends the "off-duty police officer was less credible because he did not write a report and his wife did not testify."

¶12 The jury, not the appellate court, weighs the trial evidence and chooses between contradictory versions. *State v. Thomas,* 104 Ariz. 408, 411, 454 P.2d 153, 156 (1969) (internal citations omitted). The credibility of a witness is for the trier of fact and not this Court. *State v. Gallagher,* 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) (citation omitted).

¶13 The State presented evidence that the truck was fully operational and defendant had the keys. Officer P.M. testified he saw defendant drive the truck. Officer P.M., Officer J.W., and defendant's wife testified about the location of the truck when they last saw it. The locations noted by Officers P.M. and J.W. were consistent with each other, but different from the wife's. Defendant's wife couldn't remember "exactly" where she parked the truck, but stated she returned later that day to "an area that I remember going to." A reasonable jury could have found the State's evidence to be more credible.

3. Previous Conviction

¶14 Defendant asserts his previous misdemeanor DUI "should not have been brought up and used against him." In the

alternative, he contends he should have received credit for time served on that offense.

¶15 A DUI offense is "aggravated" when a person "commits a third or subsequent violation of . . . § 28-1382." A.R.S. § 28-1383. Defendant's prior DUI offenses were violations of A.R.S. § 28-1382 (Supp. 2009) and were, therefore, relevant to the elements of the current charges against him. Section 13-712 (Supp. 2009) allows pre-sentence incarceration credit for "[a]ll time actually spent in custody *pursuant to an offense* until the prisoner is sentenced to imprisonment *for such offense.*" (Emphasis added.) Defendant was not entitled to credit for time spent in custody for prior offenses.

4. Additional Time to View Fingerprints

¶16 Defendant asserts his attorney should have objected when the State sought additional time for its expert to review his fingerprints. Ineffective assistance of counsel claims must be brought in proceedings pursuant to Rule 32, Arizona Rules of Criminal Procedure. "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of their merit." *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

5. Amendments

¶17 Defendant contends the trial court should not have granted the State's unopposed motion to amend the indictment to conform to the evidence. We disagree.

¶18 Arizona Rule of Criminal Procedure 13.5(B) permits the charging document to be amended to correct "technical defects . . . to conform to the evidence adduced at any court proceeding." The indictment on count 1 referenced defendant's prior conviction on "case No TR000050091" and on count 2, "case number CR 2000050091." The MVD analyst testified that the correct case number for both counts was "TR 0500996." The State moved to correct "just the technical defect" of the case numbers without changing the substance of the charges. The trial court appropriately granted the motion.

6. Conduct or Complaint File

¶19 Defendant asserts he was denied the "conduct or complaint file" of Officer P.M. and that having this information may have been helpful "to understand his character." Arizona Rules of Evidence allow, under certain circumstances, a witness's credibility to be impeached by evidence of "untruthfulness" or criminal "conviction." *See* Ariz. R. Evid. 607 (allowing the credibility of a witness to be attacked by any party); 608(a) (allowing credibility to be attacked by "character for truthfulness or untruthfulness"; 609(a)(2)

(allowing credibility to be attacked by prior conviction of crime involving "dishonesty or false statement").

¶20 The State moved to preclude evidence about an "ongoing integrity investigation" of a witness. Because the investigation was "in its preliminary stages," no information about "an integrity file or the outcome of the investigation" was available. The trial court granted the motion, stating the "investigation does not involve any allegations of veracity . . . so I believe that it would be highly prejudicial to introduce evidence of that nature at trial, especially when he hasn't even been formally charged in the investigation, so he is presumed to be innocent." The trial court has considerable discretion regarding evidentiary matters, which will not be disturbed on appeal absent clear abuse. *State v. Salazar,* 173 Ariz. 399, 405, 844 P.2d 566, 572 (1992). We find no abuse of discretion here.

CONCLUSION

¶21 We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154,

156-57 (1984). On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge